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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 154.

PATRICK BURNS AND PATRICK DEGMEN, APPELLANTS

vs.

JACOB MEYER, ISAAC MEYER, AND JAMES BANNERMAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JULY 6, 1877.

Bradley

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1 THE UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

PATRICK BURNS ET AL., COMPLAINANTS,
vs.
JACOB MEYER ET AL., DEFENDANTS. } In equity.

Be it remembered that heretofore, to wit, the following proceedings were had in the above-entitled cause in the circuit court of the United States for the eastern district of Missouri, on Friday, April 7th, 1876, to wit:

PATRICK BURNS ET AL., COMPLAINANTS,
vs.
JACOB MEYER ET AL., DEFENDANTS.

This day come the complainants, by their solicitor, S. S. Boyd, esquire, and file their bill of complaint herein against the said defendants, and on motion of said solicitor, it is ordered that subpœnas in chancery be issued against said defendants returnable to rules the first Monday, the first day of May next.

The said bill of complaint so filed as aforesaid is in the words and figures following, to wit:

Bill of complaint.

Circuit court of the United States in and for the eastern district of Missouri.

PATRICK BURNS AND PATRICK DEGMAN, COMplainants,
vs.
JACOB MEYER, ISAAC MEYER, AND JAMES Bannerman, trading as partners under name of Meyer, Bannerman & Co., defendants. } In equity.

To the honorable the judges of the circuit court of the United States in and for the eastern district of Missouri:

Patrick Burns and Patrick Degman, both residents of the city and county of Saint Louis, in the State of Missouri, and citizens of said State of Missouri, bring this bill against Jacob Meyer, Isaac
2 Meyer, and James Bannerman, resident of and trading under the firm name of Meyer, Bannerman & Co., at Saint Louis, in the county of Saint Louis, in the State of Missouri, and citizens of said State of Missouri.

And thereupon your orators complain and say that heretofore and before the 23rd day of November, A. D. 1869, one John Shelly was the true, original and first inventor of a certain new and useful improved side-saddle tree, not known or used before, and not in public use or on sale with his consent or allowance for more than two years prior to his application for a patent therefor.

And your orators further show unto your honors that said John Shelly so being the inventor of said improvement, and being a citizen of the United States aforesaid, made application to the proper department of the Government of the United States for letters-patent in ac

cordance with the then existing acts of Congress, and having duly complied in all respects with the conditions and requisitions of said acts, on the 23d day of November, A. D. 1869, letters patent of the United States, numbered 97236, signed, sealed, and executed in due form of law for the said invention or discovery, were issued to one John J. Grimsley as assignee of said inventor, John Shelley, whereby there was granted and secured to said Grimsley, his heirs, executors, administrators or assigns, or intended to be, for the term of seventeen years from the 23d day of November, A. D. 1869, the full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said invention or discovery throughout the United States and the Territories thereof.

And your orators further show unto your honors that afterwards, to wit, on or about the 1st day of April, A. D. 1875, the said John J Grimsley, by an assignment in writing of that date, sold, assigned, and transferred unto the said John Shelly all his right, title and interest in and to said letters patent and invention, which said assignment was duly recorded in the Patent Office of the United States, as by said assignment, or a duly authenticated copy thereof, and the certificate of such recording thereto affixed ready in court to be produced, will fully and at large appear.

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And your orators further show unto your honors that afterwards, to wit, on or about the 7th day of April, A. D. 1875, the said John Shelly, by an assignment in writing of that date, sold, assigned and transferred unto your orators, under their firm name of Burns & Degnan, all his right, title, and interest in and to said letters patent and invention, which said assignment was duly recorded in the Patent Office of the United States, as by said assignment, or a duly authenticated copy thereof, and the certificate of such recording thereto affixed, ready in court to be produced, will fully and at large appear.

And your orators further show that your orators and their assignors extensively applied the said invention to practical use, and have been, and, but for the infringement hereinafter complained of, would still be in the undisturbed possession, use, and enjoyment of the exclusive privileges secured by the said letters patent, and in receipt of the profits of the same.

And your orators further show unto your honors, as they are informed and believe, that the said defendants hereinafter named, well knowing all the facts hereinbefore set forth, are now making, selling, and using the said patented improvement, or a side-saddle tree, in some parts thereof substantially the same in construction and operation as in the said letters patent mentioned, the exclusive right and privilege to make, use, and vend which, throughout the United States and the Territories thereof, is thus by law vested in your orator. And so it is, may it please your honors, that the said defendants, as your orators are informed and believe, without the license of your orators, against their will and in violation of their rights, have made, sold and used, and intend to continue still to make, use, and sell the said patented improvement within the eastern district of Missouri, all of which is in violation of the said letters patent and the rights of your orators thereunder, and refuses to account and pay over to your orators the profits made by such use, all of which is contrary to equity and good conscience.

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To the end, therefore, that the defendants may, if they can, show reason why your orators should not have the relief hereby prayed, and that they may make a full disclosure and discovery of all the matters aforesaid, and upon their several corporal oaths, and according to the

best and utmost of their knowledge, remembrance, information and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are required to answer, that is to say:

1. Whether the said original letters patent were granted and issued to the said John Shelly's assignee, and whether the said several assignments as above set forth were made as alleged.

2. Whether the said respondents, or either of them, have made, used, or sold any side-saddle trees substantially like that set forth and described in the said letters patent, and how many of such have they or either of them so made or sold, or used. Describe fully and particularly the construction of the side-saddle trees made, sold, or used by said respondents or either of them.

And your orators further show unto your honors that *that* the said respondents have heretofore manufactured said side-saddle trees under a license from your orator's assignors, which said license having expired by its own limitation your orators have refused to renew, but have long since notified said respondents that they must cease and desist from any further manufacture, sale, or use of said side-saddle tree, which
5 said notice said respondents, and each of them, have utterly failed and refused to obey, but have continued such infringement and threaten to persist in the same in the future.

And now, to the end that the defendants may be compelled to account for and pay over the income thus unlawfully derived from the violation of the rights of your orators as above, and be restrained from any further violation of said rights, your orators pray that your honors may grant a writ of injunction restraining the defendants, & each of them, their clerks, agents, attorneys, servants, and workmen, from any further violation and infringement of said letters patent by the manufacture, sale, or use in any manner of said patented improvement, or any part thereof, in violation of the rights of your orators as aforesaid, and that the side-saddle trees now in possession or use of the said defendants may be destroyed or delivered up to your orators for that purpose; and also, that your honors, upon the entering of the decree for an infringement, as above prayed for, may proceed to assess or cause to be assessed under your direction, in addition to the profits to be accounted for by the defendants as aforesaid, the damages your orators have sustained by reason of such infringement, and that your honors may increase the actual damages so assessed to a sum equal to three times the amount of such assessment, under the circumstances of the wilful and unjust infringement by said defendants, as herein set forth; and your orators pray also for a provisional or preliminary injunction and for such other and further relief as the equity of the case may require and to your honors may seem meet.

May it please your honors to grant unto your orators not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the said Jacob Meyer, Isaac Meyer, and James Bannerman, and commanding
6 them to appear and answer unto this bill of complaint and to abide and perform such order and decree in the premises as to the court may seem meet and be required by the principles of equity and good conscience.

And your orator will ever pray, &c.

SAML. S. BOYD,
Solicitor for Compl't & Counsel.

NOTE.—The defendants are required to answer each of the foregoing interrogatories, numbered 1–2, inclusive.

SAML. S. BOYD,
Solicitor for Compl'nt.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Patrick Burns, one of the complainants in the foregoing bill named, being duly sworn, deposes and says that so far as the statements therein contained are within his own knowledge they are true, and so far as they are derived from the information of others he verily believes them to be true.

And he further says that he verily believes the said John Shelly in said bill named is the true, original and first inventor of the new and useful improved side-saddle tree which is described in the letters patent granted to John J. Grimsley, assignee of said Shelly, and mentioned in the foregoing bill; and your deponent verily believes that the title of the complainants as set forth in said bill is true.

PATRICK BURNS.

Subscribed and sworn to before me this 7th day of April, A. D. 1876.

M. M. PRICE, *Clerk*,
By A. P. SELBY, *D. C.*

And thereupon the clerk of said court issued a writ of subpœna in chancery, which appears in words and figures as follows:

Subpœna in chancery.

UNITED STATES OF AMERICA,
Eastern District of Missouri, sct:

In the circuit court of the United States in and for said district.

The President of the United States to Jacob Meyer, Isaac Meyer,
7 and James Bannerman, trading as partners under the name of Meyer, Bannerman, & Co., greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the circuit court of the United States in and for the eastern district of Missouri, on the first Monday of May next, at the city of St. Louis, then and there to answer the bill of complaint of Patrick Burns and Patrick Degnan, citizens of the State of Missouri, filed against you on the 7th day of April, 1876. Hereof fail not.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, the 7th day of April, 1876.

Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.]

M. M. PRICE, *Clerk*,
By A. P. SELBY, *Deputy.*

MEM.—The defendants to enter their appearance in this suit in the clerk's office on or before the day at which this writ is returnable; otherwise the bill may be taken pro confesso.

M. M. PRICE, *Clerk*,
By A. P. SELBY, *Deputy.*

Upon which said writ the marshal endorsed his return in words and figures following, to wit:

Marshal's return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

I have executed the within writ by delivering a copy thereof, together with a copy of the petition thereto attached, to the within named Isaac Meyer, and a copy of said writ to each of the within named, Jacob Meyer and James Bannerman, at St. Louis, in said district, this 7th day of April, A. D. 1876.

H. W. LEFFINGWELL,
United States Marshal, Eastern District of Missouri,
By JAMES B. GEGGIE, *Deputy.*

And afterwards, to wit, on the 7th day of June, A. D. 1876, the defendants filed their answer to the bill of complaint herein; which answer is in the words and figures as follows, to wit:

8 *Answer.*

In the circuit court of the United States for the eastern district of Missouri. In equity.

PATRICK BURNS & PATRICK DEGNAN, COMPLAINANTS,
vs.
JACOB MEYER, ISAAC MEYER, & JAMES BANNERMAN, trading as partners under the name of Meyer, Bannerman & Co., defendants.

The joint and several answers of Jacob Meyer, Isaac Meyer, and James Bannerman, the defendants, to the bill of complaint of Patrick Burns and Patrick Degnan, complainants.

These defendants, now and at all times hereafter saving & reserving to themselves and each of them all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainants' said bill of complaint contained, for answer thereunto or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them or any of them to make answer unto, they, these defendants, severally answering, say that they admit that they are copartners under the firm-name of Meyer, Bannerman & Co., as in said bill of complaint is alleged.

And further answering herein, these defendants, and each of them, say that they have no personal knowledge that one John Shelly was the true, original, and first inventor of a certain new and useful improved side-saddle tree as alleged, in said bill of complaint, but they say that they have been informed and believe that on or about the 23d day of November, A. D. 1869, letters patent of the United States, numbered 97236, were issued to one John J. Grimsley, as assignee of said John Shelby, whereby there was granted to said Grimsley and his legal representative, for the term of 17 years, from the 23d day of November, 1869, the right of making, constructing, using, and vending to others to be
9 used the said invention claimed by said John Shelby, as stated and alleged in said bill of complaint.

And further answering herein, these defendants and each of them say, that they have no personal knowledge, but have been informed and believe that about the time mentioned in said bill of complaint, the said John J. Grimsley sold, assigned and transferred his interest in said letters patent to said John Shelby; but whether the said John Shelby afterwards, at the time alleged in said bill of complaint, or any other time, sold, assigned, or transferred his right, title and interest in said letters patent and invention to the complainant herein, as in said bill of complaint is alleged; these defendants say that they have no knowledge or information sufficient to form a belief, beyond the allegations contained in said bill of complaint and the statement of complainants.

And further answering herein, these defendants say, that they have no knowledge or information sufficient to form a belief as to the extent to which said invention has been applied to practical use, or whether the complainants are in the undisturbed possession, use and enjoyment of the privileges secured by said letters patent, or whether they are in receipt of profits therefrom.

And further answering herein, these defendants severally deny that they or either of them are now making, selling, or using the said patented improvement, or a side saddle tree in some parts thereof substantially the same in construction or operation as in said letters patent mentioned, and they severally deny that they have without license made, sold, or used the said patented improvement within the eastern district of Missouri, or elsewhere; and deny that they intend to make, sell or use the said patented improvement within the eastern district of Missouri, or elsewhere.

And further answering herein, these defendants say, that on or about the first day of July, 1874, these defendants and the said John J. Grimsley entered into a contract in writing, of that date, in words & figures following, to wit:

ST. LOUIS, *July 1st*, 1874.

"In consideration of Meyer, Bannerman & Co. buying of me my patent side-tree, I agree to give said Meyer, Bannerman & Co. the sole right to manufacture and sell my patent side-saddle for this city & county for the term of one year, it being understood and agreed that in the event of any law suit which would entail loss on me to keep my portion of this contract, then this contract is to be null and void and of no effect whatever. A notice from me with corresponding proofs will be de*mand*ed sufficient to terminate this contract.

"Signed in duplicate.

"JOHN J. GRIMSLEY.
"MEYER, BANNERMAN & CO.

"Attest:
"H. B. STANBURG."

That these defendants have reason to believe and do believe, that said complainants had notice of said contract and the terms thereof prior to their acquiring an interest in said letters patent, mentioned in their bill of complaint.

That from about the date of the execution of said contract to July 1st, 1875, these defendants, in their said firm name, purchased of said Grimsley, as near as they have been able to ascertain, about 27½ dozen side-saddle trees, which said purchases were the only purchases made by them under said contract. That the side-saddle trees purchased by

them from said Grimsley under said contract, they at the time of said purchase supposed were manufactured in conformity with the principles covered by said letters patent numbered 97236, but afterwards learned, upon an examination of the specifications and claims made by said patentee, that the trees so purchased were, according to the best of their knowledge and belief, wholly unlike the invention covered by said letters patent, and they therefore, upon their best judgment & belief say,

that it is not true as alleged in said bill of complaint that they or
11 either of them ever did make, sell or use the said patented improvement, or a side-saddle tree which was constructed substantially upon the principles covered by said patented improvement, although they say that by the terms of said contract they had good right and lawful authority to finish and sell side-saddle trees manufactured under said patented invention for one year from said first day of July, 1874.

And further answering herein, these defendants and each of them say, that the only other side-saddle tree which they have used or sold since complainants' alleged ownership of said patented improvement, were made and constructed upon the principles contained in letters patent numbered 177233, issued to Orlando V. Flora, May 9th, 1876, the original application for which, as they are informed and believe, was made about November 23d, 1874, and they say that they have also sold a small number of side-saddles manufactured upon the principles contained in what is commonly known as the Gathright patent; but these defendants say that so far as they are able to judge of and understand the principles contained in said two last named patents, they are not substantially like those contained in said letters patent, mentioned in complainant's bill of complaint.

And further answering herein, and by way of specific answer to interrogatory number one, these defendants and each of them, in answer thereto severally say, that they and each of them do not know of their own knowledge whether said letters patent were granted or issued to said John Shelby's assignee, or whether the assignment thereof as alleged in said complainant's bill of complaint were made as alleged, but they and each of them say that they are informed and believe that said letters patent were so issued, and that said assignments thereof were made as alleged.

And further answering herein, and by way of specific answer
12 to interrogatory number two in said bill of complaint, these defendants and each of them, under their several corporal oaths say, that they nor either of them have made, used or sold any side-saddle trees substantially like that set forth and described in the letters patent numbered 97238, excepting as hereinafter stated. They say that on or about the first day of July, 1874, they entered into an agreement with one John J. Grimsley which is hereinbefore fully set forth, and that under said agreement they bought from said Grimsley about 27½ dozen side-saddle trees, which they say they finished and sold, but they say that the trees furnished them by said Grimsley according to their best judgment & belief, were not made in conformity with the improvement claimed in said Shelby's invention; they further say that since said saddle trees so bought of said Grimsley were sold and disposed of, they have finished and sold about 15 dozen side-saddle trees made upon the principles contained in letters patent numbered 177233, issued to Orlando V. Flora, May 9th, 1876, the original application for which, as they are informed and believe, was made about November 23d, 1874, and they say that they have also manufactured and sold a small num-

ber of side-saddle trees under the principles contained in what is commonly called the Garthright patent; but these defendants say, that so far as they are able to judge of, and understand the principles contained in said two patents last above named, they are not substantially like those contained in said letters patent mentioned in complainant's bill of complaint. And these defendants say that the side-saddle trees so manufactured and sold by them are the only side-saddle trees sold, used or made by them since complainants acquired an interest in said Shelly patent, as shown by said bill of complaint.

And these defendants deny all and all manner of unlawful com-
13 bination and confederacy wherewith they are by the said bill charged, without this, that there is any other matter, cause or thing in the said complainant's said bill of complaint contained, material or necessary for these defendants or either of them to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or belief of these defendants, all of which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

LEE & ADAMS,
Solicitors for Def'ts.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Isaac Meyer, Jacob Meyer, and James Bannerman being duly sworn, on their oaths state that they are defendants in the above-entitled cause; that they have read the foregoing answer, and know the contents of the same; that the same is true of their own knowledge, except as to matters which are stated therein on information and belief, and as to those matters deponents believe them to be true.

JACOB MEYER.
ISAAC MEYER.
JAS. BANNERMAN.

Sworn to and subscribed before me this 7th day of June, 1876.

C. M. WARD,
U. S. Commissioner Eastern Dist. Mo.

And afterwards, to wit, on the 18th day of September, 1876, the complainants filed their replication to defendants' answer, which replication is in words and figures following, to wit:

Replication.

United States circuit court, eastern district of Missouri. In equity.

14 PATRICK BURNS ET AL.
vs.
JACOB MEYER ET AL.

The replication of the above-named complainants to the answer of the above-named defendants.

These repliants, saving and reserving to themselves now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of said

answer, for replication thereunto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in law to be answered unto; that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

SAML. S. BOYD,
Solicitor for Complainant.

And afterwards, to wit, at a regular term of the circuit court of the United States for the eastern district of Missouri, begun and holden on the third Monday, the 19th day of March, 1877, the following proceedings were had in said cause on Wednesday, April 25th, 1877, to wit:

Decree.

PATRICK BURNS ET AL., COMPLAINANTS,
vs.
JACOB MEYER ET AL., DEFENDANTS.

This day come the said parties by their solicitors, the complainants by S. S. Boyd, esquire, and the defendants by Messrs. Lee and Adams; and this cause having been set down for hearing, the same is submitted to the court upon the pleadings and proofs herein. On consideration thereof, and being fully advised in the premises, the court finds the equities herein for the defendants.

It is therefore now ordered, adjudged, and decreed that the bill of complaint be dismissed, that the said complainants pay the costs herein to be taxed, and that a fee bill or execution issue therefor.

And afterwards, at said term of said court, the following further proceedings were had in said cause on Wednesday, the 2d day of May, 1877, to wit:

Appeal granted.

PATRICK BURNS ET AL., COMPLAINANTS,
vs.
JACOB MEYER ET AL., DEFENDANTS.

This day come the complainants by their solicitor, and pray the court to grant them an appeal from the decree herein to the Supreme Court of the United States; and thereupon it is ordered that an appeal as herein prayed be and the same is hereby allowed upon said complainants filing an appeal-bond as required by the practice of this court.

And afterwards, at the said term of said court, the following further proceedings were had in said cause on Friday, May 4th, 1877, to wit:

PATRICK BURNS ET AL., COMPLAINANTS,
vs.
JACOB MEYER ET AL., DEFENDANTS.

This day come the complainants by their solicitor, and present to the

court their bond for appeal, which bond is approved and ordered to be filed as part of the record herein.

It is further ordered that the clerk of this court make out and certify a full and complete transcript of the record and proceedings herein to the Supreme Court of the United States.

The said bond for appeal, so filed as aforesaid, is in the words and figures following, to wit:

Bond.

Know all men by these presents, that we, Patrick Burns and
16 P. C. Murphy, are held and firmly bound unto Jacob Meyer, Isaac Meyer, and James Bannerman in the full and just sum of five hundred dollars, to be paid to the said Jacob Meyer, Isaac Meyer, and James Bannerman, their heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 4th day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas lately, at the March term, 1877, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between Patrick Burns and Patrick Degnan, plaintiffs, and Jacob Meyer, Isaac Meyer, and James Bannerman, defendants, judgment was rendered against the said Burns and Degnan, and the said Burns and Degnan having obtained an appeal of the said court to reverse the judgment in the aforesaid suit, citing and admonishing defendants to be and appear at a Supreme Court of the United States to be holden at Washington the 2d Monday of October next:

Now the condition of the above obligation is such that if the said Burns and Degnan shall prosecute said appeal to effect, and answer all damages and costs if they fail to make good their appeal, then the above obligation to be void, else to remain in full force and virtue.

PATRICK BURNS. [SEAL.]
P. C. MURPHY. [SEAL.]

Approved by—

SAMUEL TREAT, *Judge.*

There was filed in said cause a deposition taken on the part of defendants as follows:

ORLANDO V. FLORA, being duly sworn on the part of the defendants, deposeth and says:

My name is Orlando V. Flora. I reside in Madison, Indiana; am by occupation a mechanic.

17 Question. Have you had any experience in patent matters, and, if so, of what nature and for how long a time?

Answer. I have been engaged in taking out patents and manufacturing patented articles about twenty-one years. I have had occasion during these twenty-one years to examine patents and the manufactory of patented articles with reference to the question as to whether the article was manufactured under the patent.

Question. Have you during this time had any experience in the manufacture of side-saddle trees?

Answer. Yes, sir; I have.

Question. I now hand to you copies of letters patent of the United

States No. 97236, marked –, dated Nov. 23d, 1869, being the patent referred to in plaintiffs' bill, and claimed to be owned by the complainants, and will ask you to examine the same and state if you understand the improvement to side-saddle trees therein claimed to be made.

Answer. Yes, sir; I believe I do.

Question. I now hand you a model of a side-saddle tree, to be attached to these depositions as defendants' Exhibit A; I will ask you to state what is the improvement claimed in the letters patent shown to you, and also whether or not the device there claimed is correctly shown in the model in defendants' Exhibit A.

(Objected to by S. S. Boyd, counsel for the plaintiff, as calling for the opinion of the witness as to the construction of the letters patent.)

Answer. The improvement in this seems to consist of a side-saddle tree with side bars, and each made entirely separate by the tree maker, and these united by the saddler. It is correctly shown with the exception of the horns of the front part of the tree, which are not attached in this model; the posts also are not shown.

Question. I now show you a model of a side-saddle tree, to be
18 attached to these depositions and to be marked as defendants' Exhibit B, and will ask you to compare it with the claim made in the letters patent already shown you, and state whether you find in said model Exhibit B the improvement claimed in said letters patent; if there are any differences please state them, and have reference in your answer also to the model marked as defendants' Exhibit A.

(Objected to by Mr. Boyd for the reasons given in the above objections.)

Answer. I do not find the improvements in this model that are shown in the letters patent; the difference between this model marked B and the improvement claimed in the letters patent is that this tree is entirely completed by the tree maker, and the seat is composed of one piece of bent wood, its mechanical construction being entirely different from the one marked A.

Question. State whether in defendants' Exhibit B the seat is made separate from the side bars.

Answer. It is made in a separate piece and attached by the tree maker.

Question. How is it in this respect with defendants' Exhibit A?

Answer. Well, it makes a complete manufactured article, whereas Exhibit A does not.

Question. When you say it makes a complete manufactured article, which exhibit do you refer to?

Answer. I refer to Exhibit B.

Question. State whether in either of these two models shown you, Exhibits A and B, the seat is covered separately from the side bars; if so, in which?

Answer. It is covered separately in Exhibit A.

Question. What is the fact as to Exhibit B in respect to covering separately?

Answer. I am not a saddler and I am studying a moment. My impression is that it is all covered when the saddle is made up by the sad-
dler, and attached to the other parts of the tree, such as the cantle
19 bars and horns, in a different manner from the covering shown in Exhibit A.

Question. In the model Exhibit B, state whether or not either of the horns of the saddle is attached to the seat.

Answer. It is not.

Question. I now show you a model marked defendants' Exhibit C, and ask you to compare it with the improvement claimed in the letters patent shown you, and state whether you find in said model the improvements claimed in said letters patent; if there are any differences, state them.

(Objected to by S. S. Boyd, as before stated, that is for the reasons before stated.)

Answer. I do not find the improvements claimed; the mechanical construction is entirely different from either Exhibit A or B; the rails forming the seat in Exhibit C are attached at their extremities to the cantle bars and crook.

Question. State of how many pieces the seat in Exhibit C is composed.

Answer. It is composed of three; two rails and the cantle forming the seat.

Question. I now show to you copy of letters patent of the United States No. 177233, marked Exhibit D, and will ask you to examine the same and state if you understand the improvement in side-saddle trees claimed in said letters patent.

Answer. I do.

Question. State whether you find in either of the models already shown you the improvements claimed in said letters patent Exhibit D; if so, in which?

(Objected to by S. S. Boyd for the reasons given above.)

Answer. I find it fully shown in model exhibit marked C.

Question. State whether in Exhibit C the seat is covered sepa-
20 rately from the balance of the tree or whether the whole tree seat and all is covered together.

Answer. It could not be covered separately; it is all covered together.

(It is admitted by the complainants and respondents that Exhibit C is a model of the saddle tree used and sold by defendants, which is referred to in their answer, as made since the Grimsley license expired.)

Question. Have you ever seen any trees manufactured in accordance with the model Exhibit B; if so, where and by whom?

Answer. I have, at Madison, Indiana, by the Eureka Saddle Tree Manufacturing Company.

Question. Who composed that company?

Answer. Flora, Moore, and Halsterne composed the company.

Cross-examined by S. S. Boyd, counsel for complainants:

Question. What Flora was that?

Answer. It was myself.

Question. When did you first see a tree manufactured like Exhibit B?

Answer. Three years ago coming June, namely, in June, 1874.

Question. Where did you see it?

Answer. In Madison, Indiana.

Question. Where was that tree manufactured?

Answer. At Madison, Indiana; they were made for J. J. Grimsley, who sent the company a sample.

Question. Did you ever see any trees like Exhibit B at the store of the defendants?

Answer. I have not.

Question. Did you not say a moment ago, when you were questioned in regard to this exhibit, that the defendant sent you a sample of it from St. Louis?

21 Answer. I have no recollection of so stating. I received a sam-

ple from them about a year and a half ago, made precisely like this Exhibit B.

Question. What was the sample sent you for?

Answer. To see at what price I would manufacture them for.

Question. Do you know by whom that sample was made?

Answer. I do not.

Question. Were you never informed by the defendants or either of them by whom that sample was made, or where they procured it?

Answer. I have no recollection of ever being so informed.

Question. Do you know from your own knowledge or from information derived from the defendants, or either of them, whether they ever sold or used saddle-trees like Exhibit B?

Answer. I have been told by Mr. Meyer, one of the defendants, that they have handled this kind of a tree marked Exhibit B.

Question. Did not Mr. Meyer, in that conversation, say who made these trees, or where he got them?

Answer. He told me that he had had a license from Mr. Grimsley for manufacturing and selling the trees. I don't mean manufacturing; they said handling, whatever that word implies.

Question. I will now show you model marked complainants' Exhibit N, and you will please state how the tree upon which the saddle is made corresponds with or differs from the tree marked Exhibit B.

Answer. I think it is made upon the same kind of a tree.

Question. Please answer the same question in relation to Exhibit C.

Answer. I don't consider that it corresponds with Exhibit C, that is, I mean the tree don't correspond with Exhibit C.

Question. Can Exhibit C be covered and converted into a saddle so as to correspond with the saddle as shown by Exhibit N?

(Objected to by E. W. Pattison, counsel for the defendants, be-
22 cause it is irrelevant and in competent under the issues in this cause.)

Answer. They will doubtless be very similar when completed.

Question. If they will differ at all, please state how.

(Objected to by E. W. Pattison, for the reasons before stated.)

Answer. A difference might occur from the saddler making it up differently.

Question. Who made models A and C?

Answer. I did.

Question. Are the defendants selling the saddle shown in Exhibit D?

Answer. They were a year ago. I don't know anything about it since.

Question. Are you or the company with which you are connected engaged in manufacturing, using or selling trees like Exhibits B and C, or either of them?

Answer. I have not been engaged for two years with the company that made the tree as shown by Exhibit B. I have manufactured Exhibit C until about a year ago.

Question. Are you now interested in any wise in the manufacture of trees like Exhibits B or C?

Answer. No; the tree C has not been manufactured for a year.

Question. When you say in your direct examination that you have been engaged about twenty-one years "in taking out patents," what do you mean by that?

Answer. I mean, I have procured patents upon my own improvements.

Question. Do you mean that you have acted as solicitor in procuring those patents?

Answer. Sometimes I have.

Question. How many times?

Answer. I don't remember in how many cases.

Question. Why did you not in all cases.

Answer. Some of them were too difficult for my draftsmanship.

Question. Did you ever procure patents, or act as solicitor in procuring patents for persons other than yourself?

Answer. I have not.

23, 24 Question. What has been your business for the last twenty-one years?

Answer. I have worked at carpentering, model-making and saddle-tree making.

Question. How long were you engaged as a model-maker?

Answer. I never made it a specialty, but have done all I could get to do of it during the whole time.

Redirect by E. W. PATTISON:

Question. Did Mr. Meyer say whether or not those trees which defendants had like Exhibit B were furnished by Grimsley?

Answer. I can't say. I don't remember what the conversation was about. I only know that he said he had had a license for handling those trees from Grimsley.

Question. How would a saddle made up on a tree like Exhibit A compare with Exhibit N?

Answer. It would not compare at all.

Question. Why not?

Answer. The mechanical construction of Exhibit A is bad, and it would make an ill-shaped and would make a bad-looking saddle.

Question. State, if you know, whether any saddle trees were manufactured for Grimsley by any person, which were similar to model marked Exhibit A.

Answer. From my own knowledge I do not know, but have been told by a party that he made them in the Northern Indiana Penitentiary for Grimsley some eight or nine years ago.

Question. In saddle-tree Exhibit N is the seat made separate from the tree and then attached?

Answer. It is not.

(Signed) ORLANDO V. FLORA.

25 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true and complete transcript of the record and proceedings had in case No. 815 of Patrick Burns et al., plaintiffs, against Jacob Meyer et al., defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this seventh day of June, in the year of our Lord eighteen hundred and seventy-seven.

[SEAL.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY,
Deputy.

(Indorsement on cover:) No. 154. Patrick Burns and Patrick Degmen, appellants, vs. Jacob Meyer, Isaac Meyer, & James Bannerman. E. Missouri C. C. U. S. Filed 6th July, 1877.

THOS. S. BOWMAN, Printer, 206 North Third Street, St. Louis.

Supreme Court of the United States

No. 154.

PATRICK BURNS, ET AL., *Appellants,*
vs.
JACOB MEYER, ET AL., *Appellees.*

Appeal from U. S. Circuit Court, Eastern District of Missouri.

BRIEF FOR APPELLANTS.

SAM'L S. BOYD,
Counsel for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1879.

PATRICK BURNS, ET AL., *Appellants,* vs. JACOB MEYER, ET AL., *Appellees.*

Appeal from U. S. Circuit Court, Eastern District of Missouri.

No. 154.

BRIEF OF S. S. BOYD, FOR APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal from a decree of the United States Circuit Court for the Eastern District of Missouri, dismissing the bill filed by the appellants for the infringement of Letters Patent No. 97,236, granted one John Shelly, on the 23d day of November, 1869, for "Improved Side-Saddle Tree," the title to which was vested in appellants. The answer of defendants denies infringement, but admits that they have made and sold Side-Saddle Trees constructed in accordance with Letters Patent No. 177,233, granted them and one O. V. Flora, on the 9th day of May, 1876.

The Court below dismissed the bill on the ground that there was no infringement by appellees.

Assignment of Error.

The appellants assign for error that the Court below dismissed the complainants' bill on the ground that defendants did not infringe.

Points.

The only issue is that of infringement. The validity of the appellants' patent being unassailed, the title of appellants being admitted, and the Side Saddle Tree made and sold by defendants being shown in the Flora patent and tree put in evidence.

Exhibit 2 is Shelly's (Complts.) patent.
" A & B is Shelly's (Complts.) tree.
" C is Flora's (Defts.) tree.
" D is " " " patent.
" N is Shelly's (Complts.) saddle complete.

The several patents are annexed to this brief for convenience of reference.

Our patent relates to an improvement in the construction of Side-Saddle *Trees*, whereby the manufacture of the saddle is simplified and cheapened, and the completed saddle rendered more comfortable for the rider and much easier for the horse. In the manufacture of Side-Saddles prior to our patent, it was customary for the saddler to take the ordinary tree, consisting of side-bars, cantle and horns, and " with hay, padding, &c., 'build up' to form a level or nearly level

seat." Never before our patent, so far as appears, had a Side-Saddle Tree been made having a seat consisting of a frame distinct from the side bars, so as to do away with this 'building up,' and never before does it appear that a Side-Saddle Tree was so made as to admit in the completed saddle of a free circulation of air between the horses back and the seat. To accomplish these results, and thereby remedy the defects inherent in the old construction Shelly makes the invention covered by our patent, the claim of which is as follows:

As a new article of manufacture a Side-Saddle Tree, having the side bars and seat made separate and then united, substantially as and for the purpose shown and specified.

That is, our patent is for a "*manufacture*"—not for a technical combination of parts constructed in a specified manner—not for a seat consisting of but *one* piece, made and attached exactly as shown and described—not even for a seat of the form and proportions shown—but for a Side-Saddle Tree of which the side bars and seat are made of separate and distinct parts, to be in some convenient way united to form the complete tree, the manner and time of such union, —whether before the tree is covered or after—being of no importance in considering the question of infringement.

Although the law as to infringement is familiar, yet it may be of benefit to collate a few decisions of this Court.

"To infringe a patent, it is not necessary that the thing patented should be adopted in every particular. If the patent is adopted substantially by the defendants, they are guilty of infringement."

Sewall vs. Jones, 91 U. S. 183.

"In an action for infringement the first question is whether the machine used by defendant is substantially in its principles and mode of operation like the plaintiffs. If so, it is an infringement to use it. If he has taken the same plan and applied it to the same purpose, notwithstanding he may have varied the process of the application, his manufacture will be substantially identical with that of the patentee."

Idem, 184.

"It is generally true that when a patentee describes a machine and then claims it as described that he is understood to intend to claim and does by law actually cover, not only the precise form he has described, but all other forms which embody his invention; it being a familiar rule that to copy the principle or mode of operation described is an infringement, although such copy should be totally unlike the original in form or proportion * & * * And in the numerous cases where it has been held that to copy the patentees mode of operation was an infringement, the infringer has got forms and proportions not described and not in terms claimed."

Winans vs. Denmead, 15 How., 342.

"Where form and substance are separable, where the whole substance of the invention may be copied in a different form, it is the duty of the Courts and juries to look through the form for the substance of the invention—for that which entitled the inventor to his patent and which the patent was designed to secure; where that is found there is an infringement, and it is not a defence that it is embodied in a form not described and in terms claimed by the patentee."

Idem, 343.

See also *Machine Co. vs. Murphy*, 97 U. S. 125.

Applying these principles of law to the case at bar, can there be any doubt that defendants by the use of Exhibit C, the so-called Flora patent, have infringed upon the claims of our patent for a "new article of manufacture." It stands admitted, or if not, it needs no expert testimony, but merely the most casual inspection of the Exhibit to show, that a saddle made on the Flora Tree, Exhibit C, will possess all the characteristic, all the advantages, embody every principle of the construction described and shown in the Shelly patent, save perhaps that the *one* advantage of being able to cover the seat before it is attached to the side bars may be wanting. This is the only real difference claimed by the expert of defendant (p. 12), and is caused by the defendants choosing to make their seat of *several* pieces, with the hope thereby of evading our patent. The defendants fail by their construction to obtain *all* the advantages which may belong to the precise mechanical construction and identical form shown in Shelly's patent. The gist of Shelly's invention—that which marks it as a departure from old forms and constructions—is having the seat of the tree separated from, and making no part of the side bars, so that the old 'building up' is done away with when the tree is covered, this separation of the seat and side bars is retained in the completed saddle whereby a cooling of the horse's back is produced, and a more elastic seat for the rider is obtained. These are all embodied in defendants construction, and it is no answer to our suit for them to say, inasmuch as we

do not obtain the other advantage of your construction —covering the seat while separate and removed from the side bars—we do not infringe.

"It is not necessary that the defendants should employ the plaintiffs' invention to as good advantage as he employed it, or that the result should be the same in degree, but it must be the same in kind."

Sewall vs. Jones, 91 U. S. 183.

Bearing in mind that our patent is for the *Tree*—not for the saddle after it is completed—we submit that in order to infringe, it is not necessary that the saddle maker shall be able to make his saddle—cover our tree—in one way rather than another, or attach the seat to the side bars at one period of completion rather than at another. This is a matter with which we have no concern, upon which the validity of our patent can in no wise depend—upon which the question of infringement can in no wise turn, or by which the decision of that question can in any manner be affected. It can have importance only in the assessment of damages, where the *degree* of infringement may be considered.

If this property of being covered in the manner specified in the statement of advantages in our patent —a statement which is mere surplusage, the specification being perfect and complete without it—were the only or even the main advantage possessed by our tree, then there might perhaps be some point in the contention that defendants' construction does not admit of such treatment. But when the other advant-

ages set forth—the "dispensing with padding"—the "spring" in the seat, the space "between the side bars and seat for circulation of air," are all clearly possessed by defendants' tree, as will appear from an inspection of Flora's patent, and of model Exhibit N., which the expert says represents defendants' saddle, it seems to us that so many of the most important advantages of our construction are retained, that the failure to obtain this minor one can hardly relieve them of the charge of infringement. They adopt and utilize the gist of our invention—having the side bars and seat made of separate pieces, so that when united they may still be separate—have a space between them for circulation of air and to give a spring to the seat when the saddle is completed.

Though the motive of the defendants is no test of infringement, still where it appears that their action was deliberate and willful, showing an intention to take the chance of being held liable, we think that any doubt there may be in the mind of the Court will be resolved against the defendants and in favor of the patentees. The patent under which defendants justify was granted to the expert Flora, who before obtaining it had made our tree for our assignor Grimsley, and the defendants had sold our tree from July 1874, to July 1875, under a license with said Grimsley, so that both knew the value of our construction and it is evident set about copying it in such way, as, while obtaining its advantages, they should not lay themselves liable to prosecution. It may be noted here how

strictly the Patent Office confined Flora to the precise mechanical construction shown in his patent, and also how broad a disclaimer—a disclaimer clearly looking to our patent—he was required to incorporate in his specification, before the Office would allow him even this limited claim.

All the changes introduced by defendants are purely mechanical such as are within the capacity of any one possessing ordinary mechanical skill and knowledge of this specialty—and even if they constitute any improvement upon our construction must nevertheless be held subordinate to our patent, since even if "unlike the original in form or proportions," they still "copy the principle or mode of operation," described and shown in our patent.

SAML. S. BOYD,

Counsel for Appellants.

UNITED STATES PATENT OFFICE.

JOHN SHELLY, OF ST. LOUIS, MISSOURI, ASSIGNOR TO JOHN J. GRIMSLEY, OF SAME PLACE.

Letters Patent No. 97,236, dated November 23, 1869.

IMPROVED SIDE-SADDLE TREE.

The Schedule referred to in these Letters Patent and making part of the same.

To all whom it may concern:

Be it known that I, JOHN SHELLY, of the city and county of St. Louis, State of Missouri, have invented a new and useful improved Side-Saddle Tree, of which the following is a full, clear, and exact description, reference being had to the annexed drawing, making a part of this specification, in which—

Figure 1 represents a top view of my tree.

Figure 2 represents a longitudinal section of same.

Similar letters indicate like parts.

The object of my invention is to simplify and cheapen the manufacture of side-saddles, and also render them easier for both rider and horse, by a change in the construction of the tree.

The tree A, Fig. 1, has upon it four projections *a a'*, *b b'*, fig. 1, *a' b'*, fig. 2, two on each side-bar *c c'*, the latter being made otherwise in the ordinary manner. as seen.

The seat B, figs. 1 and 2, is made separate and distinct from the tree, and, resting on the supports *a a'*, *b b'*, is securely fastened to the tree by screws *a' d'*, figs. 1 and 2, or other suitable device.

The large horn *h* may, as shown, be made separate from the seat and screwed on to it, or it may form a part of the seat, as in practice may be deemed best.

The small horn *k* may also either form part of the side-bar or be separate from it, as I do not desire to limit myself as to the manner of constructing these details.

When the saddle is to be made, the tree and seat are covered separately, which, of course, much simplifies and quickens the operation, and requires a less skilful morkman than if they were covered together. Thep are simply screwed together, and the saddle is complete.

Not so much padding will be required in the seat, for, by reason of the supports *a a'*, *b b'*, it will have considerable "spring," and, indeed, a very comfortable saddle may be formed by a simple covering of skin stretched over the seat.

By this mode of covering, a space, *o*, is left between the side-bars and the seat for the circulation of the air, thus rendering the saddle much cooler and less liable to cause galling of the horse.

What I claim as my invention, and desire to secure by Letters Patent is—

As a new article of manufacture, aside-saddle tree, having the side-bars and seat made separate and then united, substantially as and for the purpose shown and specified.

JOHN SHELLY.

Witnesses:

SAML. S. BOYD.

JOHN J. GRIMSLEY.

UNITED STATES PATENT OFFICE.

ORLANDO V. FLORA, OF MADISON, INDIANA, ASSIGNOR OF TWO-THIRDS HIS RIGHT TO MEYER, BAUNERMAN & CO., OF ST. LOUIS, MISSOURI.

IMPROVEMENT IN SIDE-SADDLE TREES.

Specification forming part of Letters Patent No. 177,233, dated May 9, 1876; application filed April 20, 1876.

To all whom it may concern:

Be it known that I, ORLANDO V. FLORA, of Madison, in the county of Jefferson State of Indiana, have invented certain Improvements in Side-Saddle Trees, of which the following is a specification:

The nature of this invention consists, principally, in providing a side tree of ordinary kind with side rails to form the frame-work of a concave seat; also in the method of forming the crook.

One important feature in my invention consists in providing the tree, as above stated, with side rails of wood, steamed and bent to the proper curve and secured to the tree, as shown.

Another important feature is the crook, constructed as will hereinafter be described.

In the drawings, Figure 1 is a plan of my invention. Fig. 2 is a front view of the same. Fig. 3 is an enlarged sectional view of the crook.

Let A A represent the side-bars, and B the cantle, of an ordinary side-saddle tree. D is the crook, E the near horn, and F the off horn.

When a saddle-tree is constructed with these elements simply, it forms the common tree, and the saddler usually "builds up" to form a level, or nearly level, seat, with hay, padding, &c To form the frame-work for a concave seat, I steam and bend to the proper form strips of tough wood, to form the side rails C C', and secure the first named to the cantle B, at the point *c*, at one end,

UNITED STATES PATENT OFFICE.

ORLANDO V. FLORA, OF MADISON, INDIANA, ASSIGNOR OF TWO-THIRDS HIS RIGHT TO MEYER, BAUNERMAN & CO., OF ST. LOUIS, MISSOURI.

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When a saddle-tree is constructed with these elements simply, it forms the common tree, and the saddler usually "builds up" to form a level, or nearly level, seat, with hay, padding, &c To form the frame-work for a concave seat, I steam and bend to the proper form strips of tough wood, to form the side rails C C′, and secure the first named to the cantle B, at the point *c*, at one end,

and to the crook D, at the point *d*, at the other end. This I call the off rail. The near rail C′ is attached to the cantle B, at the point *a*, at one end, and to the near side-bar A, at the point *b*, at the other. These rails are bent and trimmed to the proper shape, to form a continuation of the rim of the cantle around to the proper point forward, and, when covered by the saddler, serve to produce a concave seat, exactly fitted to the person of the rider, and one in which she can sit firmly and evenly on the horse.

By the proper application of the covering to this form of tree, a free circulation of air can be mantained between the seat and the horse, thereby enhancing the comfort of the latter. As the drawing shows the construction and mode of applying the rails C C′, it will not be necessary to describe them more particularly, except to state that they may be attached at the ends in any secure and rigid manner. I prefer to abut them against the cantle at the back end and glue them, adding screws or nails for additional security. The front ends may be secured in substantially the same manner.

I have shown in the drawings a method of constructing a crook that I think adapted to my tree, but I do not claim it.

I am aware that concave seats have been applied to side-saddle trees, built up of wood, and scooped out to form the hollow; but these are expensive in construction and very heavy. I am also aware that seats have been made to be sold separate from the bars, to be attached by the saddler, the said seat being a continuous rim bearing the horns. I do not claim a concave seat, nor do I claim any novelty in a tree having a passage for air between the rider's seat and the horse; but

What I claim as new is—

In combination with the side bars A A, cantle B, and horns E. F, of a common side-saddle tree, the wooden side rails C C′ steamed, bent, and dressed into the proper form, and rigidly secured to the said tree, in the manner substantially as shown and specified.

ORLANDO V. FL

Witnesses:

WM. E. MCLELAND.

W. H. POGUE.

1879
10-673

March 23.

No. 252

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 252.

THOMAS BRANCH, AND TH MAS BRANCH, ADMINISTRATOR OF JAMES R. BRANCH, DECEASED, JOHN P. BRANCH, FREDERICK R. SCOTT, AND THOMAS P. BRANCH, PARTNERS UNDER THE FIRM-NAME OF THOMAS BRANCH & CO., APPELLANTS,

VS.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 9, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 252.

THOMAS BRANCH, AND THOMAS BRANCH, ADMINISTRATOR OF JAMES R. BRANCH, DECEASED, JOHN P. BRANCH, FREDERICK R. SCOTT, AND THOMAS P. BRANCH, PARTNERS UNDER THE FIRM-NAME OF THOMAS BRANCH & CO., APPELLANTS,

VS.

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APPEAL FROM THE COURT OF CLAIMS.

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1 *Petition.—Filed Aug.* 8, 1876. *J. R.*

U. S. Court of Claims. December term, 1875.

THOMAS BRANCH, AND THOMAS BRANCH, admin'r of James R. Branch, deceased, John P. Branch, Frederick R. Scott, and Thomas P. Branch, partners, doing business under the firm name of Thomas Branch & Co.,	No. 11403.
vs.	
THE UNITED STATES.	

To the honorable the judges of the U. S. Court of Claims:

Your petitioners, Thomas Branch, and Thomas Branch, admin'r of James R. Branch, deceased, John P. Branch, Frederick R. Scott and Thomas P. Branch, surviving partners in trade under the name and style of Thomas Branch and Company, respectfully represent that they are citizens of the United States, and reside in Richmond, Virginia.

Your petitioners further represent that in June, 1865, they were the owners of fifty (50) bales of cotton in the town of Tuskegee, County of Macon, and State of Alabama, which was seized and taken possession of by the U. S. marshal/ by order of the U. S. district court for the middle district of Alabama in May, 1865, upon the information of the U. S. district attorney for the said court, as being subject to confiscation, and that the said cotton was sold by the said marshal by the order of said court July 2, 1866, for the sum of $4,050.00, at the rate of $81 per bale, and the said sum, less $2,179.50 for expenses, or $1,872.25, was turned over to the clerk of the said court by the said marshal/ July 4, 1866, by order of said court, and deposited by said clerk, under instructions from the Department of the Interior, dated May 23, 1866, in the First National Bank of Selma, Alabama, which had been designated a depositary for public moneys by the Secretary of the Treasury December 13, 1865.

2 Your petitioners further state that during the pendency of the said proceedings for the condemnation of the said fifty (50) bales of cotton in the said U. S. district court for the middle district of Alabama, and before judgment was rendered in favor of your petitioners, the said First National Bank of Selma, Alabama, then a depositary for public moneys, failed and went into liquidation under the laws of the United States and the special supervision of the Comptroller of the United States Currency.

Your petitioners further state that Cornelius Cadle, jr., was appointed receiver of the said bank by the said Comptroller of the U. S. Currency, with instructions to pay into said court two checks drawn by the said Comptroller on the assistant treasurer of the United States, New York City, numbered 9518 and 8519 respectively, for the sums of $5,196.16 and $16,852.11—the said amounts being the result of a dividend of thirty-five (35) per cent. declared from the assets of the said First National Bank upon the amounts standing on the books of the said bank to the credit of the said U. S. district court.

Your petitioners further state that on the 26th January, 1871, on motion of the U. S. district attorney for the said court, the said case for fifty (50) bales of cotton was dismissed with the right of the defendants (your petitioners) to recover of the plaintiffs (The United

States) the costs wrongfully sustained. And that under an order of the said court dated May 4, 1875, the clerk of the said court was appointed special master to receive proof from persons claiming to be entitled to any portion of the said sum of $16,158.07, and to report to said court the parties and the amounts each were entitled to; and upon full examination by the said special master, it was found that your petitioners were the owners of the said fifty bales of cotton, and were entitled to receive the thirty-five (35) per cent. of the said sum of $1,892.35, or the sum of $641.32, and the report of the said special master was approved by the said court.

Your petitioners further state that they did receive from the said special master, the clerk of said court, the said sum of $641.32, less $24.43, the fees of the said master.

Your petitioners, therefore, pray that you will render judgment in their favor for the said sum of $4,050.00, less the amount received, with interest at the rate of six per cent. per annum from the 14th
3 day of November, 1865, for the proceeds of said cotton, which they are justly entitled to from the United States.

And your petitioners pray for such other and further relief in the premises as may be equitable and just, and in duty bound they will ever pray.

THOMAS BRANCH & CO.

STATE OF VIRGINIA,
County of Henrico:

Personally appeared before me, a clerk of the court for the county and State aforesaid, John P. Branch, who subscribed to the foregoing statement in my presence, and, being duly sworn, deposes and says that he is a member of the firm of Thomas Branch and Company; that no assignment or transfer of said claim or any part thereof has been made; that the United States is justly indebted to petitioners for the amount claimed over and above all just credits and offsets, and that he believes the facts as stated in said petition are true.

Subscribed and sworn to before me on this 4th day of July, A. D. 1876.

J. F. GLENN, *N. P.*

STATE OF VIRGINIA,
City of Richmond, to wit:

I, Andrew Jinkins, clerk of the hustings court of the said city, do hereby certify that John F. Glenn is a notary public for the city of Richmond; that he was duly qualified to act as such in the said hustings court on the 10th day of April, 1873, and has been acting ever since; that he is authorized under the laws of the State of Virginia to take acknowledgements to deeds and other papers, and to administer oaths for general purposes, and that his official acts are entitled to full faith and credit.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court this 9th day of August, 1876.

[SEAL.] ANDREW JINKINS, *Clk.*

Petitioners' address: Thomas Branch & Co., Richmond, Virginia.

Petitioners' attorney's address: T. H. N. McPherson, Washington, D. C.

4 In the Court of Claims of the United States. December term, A. D. 1875.

THOMAS BRANCH AND COMPANY *vs.* THE UNITED STATES. } No. 11403.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimants herein, and, not confessing the same or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimants in the sum of three thousand four hundred and eight dollars and sixty-eight cents, says that they are not indebted to the said claimants in the said sum of money nor any part thereof.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

Filed Nov. 11, 1876.

5 *Plea.*

In the Court of Claims of the United States. December term, 1876.

THOMAS BRANCH AND OTHERS *vs.* THE UNITED STATES. } No. 11403.

Now come the defendants, by their Attorney General, and say that the claimants herein should not further have or maintain their suit against the defendants, for the reason that the petition of the claimants was not filed in this court nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

THOMAS SIMONS,
Assistant Attorney-General.

Filed Nov. 11, 1876.

6 In the Court of Claims. December term, 1876.

THOMAS BRANCH & COMPANY *vs.* THE UNITED STATES. } No. 11403.

And now come the claimants, by their attorney, and move the court to amend the petition in the above case by striking out Thomas Branch as administrator, &c.

T. H. N. MCPHERSON,
Att'y for Claimants.

Filed April 30, 1877.

Allowed.
By the court.
April 30, 1877.

7 In the Court of Claims. December term, 1876.

THOMAS BRANCH, JOHN P. BRANCH, Frederick R. Scott, and Thomas P. Branch, partners under the firm name of Thomas Branch and Company,
vs.
THE UNITED STATES. } No. 11403.

At a Court of Claims held at the Capitol in the city of Washington on the 30th day of April, A. D. 1877, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants and do order, adjudge, and decree that the claimants' petition be dismissed.

By the court.

A true transcript of record.

8 In the Court of Claims. December term, 1876.

THOMAS BRANCH AND OTHERS
vs.
THE UNITED STATES. } No. 11403.

From the judgment in the above-entitled cause on 30th day of April, A. D. 1877, in favor of defendants, the claimants, by their attorney, on the 11th day of June, 1877, made application for and give notice of an appeal to the Supreme Court of the United States.

T. H. N. McPHERSON,
Att'y for Claimants.

Filed June 11, 1877.

Ordered that this appeal be allowed as prayed for
By the court.
June 11, 1877.

9 Court of Claims.

THOMAS BRANCH AND OTHERS
vs.
THE UNITED STATES. } No. 11403.

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

1. In November, A. D. 1865, the claimants were the owners of 50 bales of cotton, when they were seized by the marshal of the middle district of Alabama, upon a warrant issued by the district court of the United States for said district, on an information filed therein by the district attorney and others, informers, for the seizure, confiscation, and condemnation thereof under "An act to confiscate property used for insurrectionary purposes," approved August 6, 1861, on the ground that said cotton "was knowingly used and employed in the district aforesaid by the owners, and with the consent of the owners thereof, in aid-

ing, abetting, and promoting insurrection or resistance to the laws and authority of the United States."

2. Pursuant to an order of said court, made June 8, 1866, said cotton was sold at public auction by the marshal, for the sum of $4,050, and after deducting therefrom $2,177.25 as the expenses of sale, the net balance of $1,872.75 was brought into court and paid over to the clerk thereof July 4, 1866.

3. Said clerk of the court having been notified by the Interior Department that the First National Bank of Selma., Ala., had been designated by the Secretary of the Treasury as a depositary of public money, deposited said money so received by him in said bank to his own credit as clerk, pending the proceedings of condemnation and to await the further orders of the court.

4. Subsequently said bank failed, went into liquidation, and a receiver thereof was appointed by the Comptroller of the Currency April 30, 1867.

5. In January, 1871, the case mentioned in the first finding, instituted for the condemnation of said cotton, was, on motion of the district attorney, dismissed, and judgment entered for the defendants for costs.

6. Upon closing the affairs of said bank by the receiver, a dividend of 35 per cent. was declared by the Comptroller of the Currency on its debts and liabilities, and the sum of $641.32 was ordered to be paid into said court as the dividend on said $1,872.75 arising from the sale of said cotton, and deposited in said bank as hereinbefore stated. Said dividend was, by order of court, received by the clerk, and in July, 1875, paid over to the claimants, less $24.43, allowed by the judge to an auditor appointed by him to report the facts in the case.

CONCLUSION OF LAW.

On the foregoing facts the claimants are not entitled to recover, and the petition must be dismissed.

RICHARDSON, J., delivered the opinion of the court:

The facts in this case, concisely stated, are these: In the year 1865 the claimants were owners of 50 bales of cotton, which were seized by the marshal of the middle district of Alabama, upon a warrant duly issued by the district court, on an information filed therein by the district attorney and others, informers, for the seizure, confiscation, and condemnation thereof, under the act of August 6, 1861, chap. 50 (12 Stats., 319), because the same were used and employed by the owners, or with the consent of the owners, in aiding, abetting, and promoting insurrection or resistance to the laws and authority of the United States. While the suit upon the information was pending, the cotton was sold by the marshal, by order of court, for the sum of $4,050, and the net proceeds, after deducting expenses, were brought into court and paid over to the clerk, amounting to $1,872.50. The clerk, having been notified by a circular from the Secretary of the Interior that the First National Bank of Selma, Ala., had been designated by the Secretary of the Treasury as a depositary of public money under the provisions of the act of June 3, 1864, chap. 106, S. 45 (13 Stats., 113), deposited the money thus held by him in said bank to his own credit as clerk, pending proceedings in the suit for condemnation and to await further orders of court. In 1867 the bank failed, went into involuntary liquidation, a receiver was appointed by the Comptroller of Currency, and

its affairs were wound up, paying a dividend of 35 per cent. to its creditors.

In January, 1871, the suit for condemnation was dismissed, on motion of the district attorney, and judgment was entered for the defendants therein for costs. In 1875 the dividend on the clerk's deposit in the bank, amounting to $641.32, was brought into court by the receiver, paid over to the clerk, and subsequently allowed and paid to the present claimants by order of the court.

All that the claimants received of the money for which the cotton was sold was 35 per cent. of the net proceeds deposited in the bank.

Upon this state of facts the claimants come into this court and seek to charge their loss upon the United States. Without setting forth in their petition the grounds on which it is claimed that the defendants are liable, they pray judgment for the whole amount for which their cotton was sold, less the dividend received by them, with interest thereon from the day of seizure, as though the United States were to be charged with damages for an illegal seizure. But in a supplementary brief, in manuscript, handed to the court since the argument by the claimants' attorney, they present their case as an action for money had and received, and rely entirely upon the position which they assume that the First National Bank of Selma, having been designated as a depositary of public money by the Secretary of the Treasury, was part of the Treasury of the United States, and that the money deposited therein by the clerk of the court was for the time being "public money" in the Treasury of the defendants, which they were bound to keep safely and return to the claimants when their right thereto became established.

This view of the relation of the national banks which are designated depositaries of public money to the United States Government is, in our opinion, wholly untenable.

National banks are private corporations, organized under a general law of Congress, by individual stockholders, with their own capital, for private gain, and managed by officers, agents, and employés of their own selection. They constitute no part of any branch of the government of the United States, and whatever public benefit they contribute to the country in return for grants and privileges conferred upon them by statute is of a general nature, arising from their business relations to
11 the people through individual citizens, and not as direct representatives of the State as a body-politic in exercising its legal and constitutional functions.

The Comptroller of the Currency has certain supervisory powers and duties in relation to national banks, designed to keep the officers within the limits of the law in conducting their legitimate business, and, as far as lies within the province of official supervision by the government, to protect the creditors and stockholders against fraud, negligence, and mismanagement. But in all contracts the banks act for themselves alone, and have no authority to involve the government in liability, except the statute liability for the final redemption of their circulating notes. These notes, denominated "national currency," and forming to a large extent the circulating money of the country, are the notes of the banks and not of the United States, although in case of insolvency of the corporations they are payable out of the Treasury, and are secured by bonds deposited with the Treasurer, and by a preference in the distribution of the assets of the banks. But the bonds so deposited are held as a special pledge for the redemption of the circulating notes, and can be held and used by the government for no other purpose, not even to

secure other indebtedness or obligations to the United States.—(12 Opin. Att'ys-Gen., 549.)

By the forty-fifth section of the general banking law (13 Stats., 113) it was provided:

"That all associations under this act, when designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the government; and they shall perform all such reasonable duties as despositaries of public moneys and financial agents of the government as may be required of them. And the Secretary of the Treasury shall require of the associations thus designated satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the government."—(Revised Statutes, § 5153.)

Designating a national bank as a depositary of public money under this provision does not change the character of its organization, or convert its managers into public officers, or give to the government any additional control over the institution or render the United States liable for any of the acts, contracts, or obligations of the bank. Nor does it constitute the bank a general financial agent of the government, but when after such designation it is required by law or by direction of the Secretary of the Treasury to perform any financial duties for the United States, it then becomes a special agent for the particular purpose required, with no power to bind the government beyond the special authority conferred upon it. In short, constituting a national bank a depositary of public money is an employment of the institution for business purposes, as it is employed by individual depositors, and not an assumption of its powers and liabilities by the national government, nor the making of it, as an institution, a part of the United States Treasury. Under the provision of the post-office laws, now no longer in force, allowing "all official communications addressed to either of the Executive Departments of the government by an officer responsible to that Department" to be sent free through the mail, it was early held by advice of the Attorney-General that the officers of designated depositaries under the general banking law were not officers responsible to the Treasury
12 Department, but were officers of the banks, responsible only to the institutions themselves, and so their correspondence on official business with the Secretary of the Treasury could not be carried free by mail.—(11 Opin's of Att'ys-Gen., 23.)

The United States Treasury proper, as constituted by what is commonly known as the "independent treasury" act, first passed July 4, 1840 (5 Stat. at Large, 385), repealed August 13, 1841, and again reenacted with additional provisions August 6, 1846 (Chap. 90, 9 Stat. at Large, 59), is a depository of public money, where the actual money of the government—gold, silver, bullion, notes, and currency—is kept in kind, as received from the public revenues, or deposited there by express authority of law, and where it remains the specific property of the government and cannot be intermingled with other funds, as the Treasurer is not authorized to permit other money to be deposited therein, except in special cases expressly provided for by statute. And the "subtreasuries," commonly so called, under the charge of assistant treasurers, where the public money is received and kept under like regulations, as well as the mints and perhaps other like places of deposit, may, in a general sense, be considered as part of the United States

Treasury.—(Revised Statutes, §§ 3591, 3592, 3593, 3594, 3595, &c.) It is made the duty of the Treasurer, all assistant treasurers and those performing the duties of assistant treasurers, all collectors of customs, all surveyors of the customs acting as collectors, all receivers of public money of the several land offices, all postmasters, and all public officers of whatever character, to keep safely any public money intrusted to them, without loaning, using, converting to their own use, depositing in banks, or exchanging the same for other funds than as specially allowed by law, and severe penalties are attached to any breach of such duty.—(Revised Statutes, §§ 3639, 5489, &c.)

But when public money is deposited with a designated depositary national bank, it is not there retained in kind as the special property of the United States, of which the bank is made the custodian, but it becomes at once the property of the bank; is mingled with its other funds, is loaned or otherwise employed in the ordinary business of the corporation; and the bank, instead of being a custodian of public money, becomes a debtor to the United States precisely as it does to other depositors on receipt of individual deposits. Such was the practical construction adopted immediately on the designation of national banks as depositaries of public money after the passage of the national banking law, and ever since uniformly followed without question. The government has the same rights and remedies against the bank as other creditors have. If the bank fails, the United States resort to the collateral security, if any, given to secure the deposits of public money to the extent of the proceeds thereof, and if after that is exhausted a balance due for deposits remains unpaid, the government takes its dividend thereon with other creditors and is entitled to no priority or preference, if the construction given in opinions of the Attorneys-General who have advised the executive officers on that subject be correct, which has not been judicially determined.—(12 Opin's of Att'ys-Gen., 549; 13 Opin's, 528.)

By section 3640 of the Revised Statutes it is provided that "the Secretary of the Treasury may [except as to money belonging to the postal service] transfer the money in the hands of any depositary of public moneys to the Treasury of the United States to the credit of the Treasurer."

Thus it is manifest that designated-depositary banks are not made part of the Treasury of the United States proper, rendering the government liable for the safe keeping or repayment of the money deposited therein to the credit of the customers of those institutions. As to its own public money intrusted thereto, it relies upon the credit of the corporations and the securities taken as collateral, of which the one is subject to the vicissitudes of the institutions and the other to the care and vigilance of the public officers. Such money, or the credits therefor, when under the control of the Treasurer of the United States and subject to his draft, may, to that extent and in some sense, be regarded as in the public Treasury, and other government money deposited there to the credit of other public officers charged with its receipt or expenditure may be considered as public money, although not in the Treasury.

13

The term "public money," as used in the statutes of the United States, ordinarily means the money of the government, received from the public revenues or intrusted to its officers charged with the duty of receiving, keeping, or disbursing the same wherever it may be. Such money, when illegally obtained therefrom, may be followed by the government into the hands of the wrongdoer and recovered as a debt due from him, with the preference over other creditors in the distribution of his

assets in case of insolvency given to the United States by sta'ute. (Bayne et al. vs. The United States, 94 U. S. Reports.) It does not include the money of States, counties, cities, and towns, although with reference to those governments and municipalities such funds in other connections would be deemed public money. Nor does it include money in the hands of the marshals, clerks, and other officers of courts, held by them under authority of law to await the judgment of the court in relation to the ownership thereof. Such money constitutes trust-funds held for individual litigants, and not for the public as represented by the government—money which cannot be used by anybody until the rightful ownership is determined, and when deposited in any bank is at the risk of the true owner, or of the officer depositing it, according as the latter has or has not legal authority for substituting the credit of the bank for his own custody thereof. The term is thus used in the act originally establishing the Treasury Department, passed September 2, 1789, chap. 12, § 6, (1 Stat. at Large, 65,) in the acts of July 4, 1840, chap. 41, (5 Stat. at Large, 385,) and August 6, 1846, chap. 90, (9 Stat. at Large, 59,) establishing the "independent treasury," in all of the numerous revenue and fiscal acts of Congress found in the Statutes at Large, as well as in the Revised Statutes, where it forms one of the principal divisions of the laws in that volume as the Fortieth Title. (Revised Statutes, §§ 3591, 3659.)

From the year 1814 to the present time there have been special provisions of law for the deposit and safe-keeping of money paid into the district and circuit courts of the United States different from those applicable to public money. By the act of April 18, 1814, chap. 62, (3 Stat. at Large, 127,) money paid into said courts to abide the order of court was required to be deposited in such incorporated bank as the court should designate, and there remain till it should be decided to whom it of right belonged. If there were no such bank in the district, the court might direct the money to be deposited according to its discretion. By the act of March 3, 1817, chap. 108, (3 Stat. at Large, 395,) all money paid into said courts or received by the officers thereof, in cases pending therein, was required to be deposited in a branch of the United States Bank, if there were one in the district, to the credit of the court, and to be drawn only upon the order of the judge, and if there were no such branch bank in the district, then in some in-
14 corporated State bank, and if there were neither in the district, then it was to be deposited according to the discretion of the judge. These acts remained in force, still requiring officers of courts to deposit in State banks their trust-funds, long after it was made a penal offense for "all public officers of whatever character" to deposit in any bank the public money collected by them, (act of 1846, chap. 90, § 6, 5 Stat. at Large, 60,) and after the passage of the general banking law of June 3, 1864, by which national banks might be made depositaries of public money; and they were not repealed until the year 1871. (Chap. 2, §6, 17 Stat. at Large, 2.)

Such was the statute law, so far as applicable in 1866, when the money now in question was deposited in the First National Bank of Selma. There being no branch bank of the United States in existence, the clerk was bound by law to deposit the money in an incorporated State bank or otherwise, according to the discretion of the court. He had no right to deposit it anywhere to the credit of the United States Treasurer, nor in the public Treasury to the credit of anybody. It was required to be deposited as a private credit within the exclusive control of the court.

In selecting a national bank, the clerk was no doubt acting under the direction and according to the discretion of the court, as he was bound by law to act, influenced, perhaps, by the circular of the Secretary of the Interior, giving notice that the First National Bank of Selma had been designated as a depositary of public money. That circular, however, did not change the legal duties and obligations of the courts or the officers thereof or of the banks named therein, and it created no liabilities whatever on the part of the United States.

The clerk did not attempt to place the money in the United States Treasury. He intrusted the funds in his custody to the safe-keeping of the bank, and took the obligation of that corporation and not of the government. The bank became his debtor, and the United States were neither creditors of the bank nor debtors to the depositor on account thereof. The government not only did not receive the money, but could not have recovered it by action nor have obtained possession of it by any process.

It will be noticed that the facts proved do not show, and the petition does not allege, that the Secretary of the Treasury had taken any security from the bank for this deposit or for the deposit of any public money therein, and that it it does not appear that he was ever notified or ever knew of this deposit having been made by the clerk of the court.

Under all these circumstances, nothing can be more clear than that the defendants are not liable in an action for money had and received, or in any other form, for the safe-keeping and return of money not belonging to the United States nor intrusted to any of their officers, but deposited by the clerk of the court in the First National Bank of Selma in his own name and to his own credit.

Since the rights and liabilities of the parties in this case, arising from the transactions set forth in the findings, were fixed, Congress has made new and different provisions, by the act of March 24, 1871, in relation to moneys paid into the courts of the United States, expressly repealing the acts of 1814 and 1817, above referred to, (Revised Statutes, §§ 798, 995, 996, 5504, 5505,) but not repealing the provisions in relation to money in the hands of assignees in bankruptcy. (Revised Statutes §5059; 14 Opins. of Att'ys-Gen., 362.)

By the law now in force all money paid into any court of the United States, or received by the officers thereof in any cause pending or adjudicated therein, must forthwith be deposited with the Treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of the court, unless it is delivered upon security, according to the agreement of parties, under the discretion of the court, as it may be by virtue of a proviso in the act of 1871, re-enacted in Revised Statutes, §995. When such money is deposited with the treasurer or an assistant treasurer, where it is mingled with the public money, it is undoubtedly intrusted to the custody of the government, but when deposited in a bank through a designated depositary, it would still seem to be the private deposit of trust-funds for the security of which the credit of the bank, and not of the government, is taken.

Whether or not the proceeds of securities taken for the protection of public money simply can be applied to the repayment of deposits to the credit of the courts, either pro rata with the debts due to the government, or after the payment of such debts, to the extent of any balance of the proceeds remaining, in case of the failure of a depository bank owing both classes of deposits, or whether the Secretary of the Treasu-

ry may now legally and properly require of designated depositaries securities sufficient to protect court funds as well as public money and so expressly pledged, or whether it is not rather within the power of the litigants interested and the discretion of the courts themselves either to require security for such deposits under the proviso above referred to or to intrust them wholly to the credit of the corporations, are questions for consideration elsewhere and not here, and we express no opinion thereon.

The judgment of the court is that the petition be dismissed.

16 In the Court of Claims.

THOMAS BRANCH AND OTHERS
vs.
THE UNITED STATES. } No. 11403.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon, of the application of the claimant's attorney for the allowance of an appeal, as filed in the clerk's office June 11, A. D. 1877, and of the order of the Court of Claims allowing the same, of the findings of fact by the court and conclusion of law thereon, and of the opinion of the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 28th day of June, A. D. 1877.

SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 252. Thomas Branch, and Thomas Branch, adm'r of James R. Branch, dec'd, John P. Branch, Frederick R. Scott, and Thomas P. Branch, partners, as Thomas Branch & Company, appellants, vs. The United States Court of Claims. Filed 9th October, 1877.

C

OFFICE SUPREME COURT U. S.
FILED
MAR 18 1880

Supreme Court of the United Sates.

No. 252.

THOMAS BRANCH, ET AL., APPELLANTS,

vs.

THE UNITED STATES, APPELLEES.

I.

The facts appear on pp. 4 and 5 of the Record, and reference is made thereto without restating them here.

The appellants' cotton was seized in November, 1865, by the Marshal of the Middle District of Alabama, upon a warrant issued by the District Court of the United States, for said district, on an information filed therein by the District Attorney, for the seizure, confiscation and condemnation thereof, under "an act to confiscate property used for insurrectionary purposes," approved August 6, 1861, on the ground that said cotton was used by the appellants in aiding, abetting and promoting resistence to the laws and authority of the United States.

The appellees in instituting the proceedings for the condemnation of the said cotton, acted through the District Attorney, (as required by Sec. 5311, Rev. Stat., act Aug. 6, 1861,) in fact, the only officer of the Government who could communicate with the court. (United States *vs.* Blaisdell, 3 Benedict, 132.)

Upon the information of the District Attorney, the court issued the warrant for the seizure of the said cotton. Whereupon the Marshal seized it, and in pursuance of an order of the said court, made June 8, 1866, said cotton was sold at public auction by the Marshal, and the pro-

ceeds were brought into court and paid over to the clerk, July 4, 1866.

The appellees here acted through the Marshal, a legally constituted officer to represent them in such proceedings. (Sargeant's Constitutional Law, chap. 25; 3 Bonvier Inst., p. 85.)

When the appellants' property was converted into money through the legally constituted instrumentality of the appellees, acting through the District Attorney and Marshal, and had been placed in possession of the court, the appellees, through the Department of the Interior, informed the clerk that the First National Bank, of Selma, Alabama, had been designated a depositary of public moneys by the Secretary of the Treasury; whereupon the clerk deposited said *public money* growing out of the confiscation proceedings against said cotton in said depositary, as he was required by law, under penalty of fine and imprisonment. The depositary being designated, the clerk was required to deposit there all public money in his possession. (Sec. 5492, R. S., acts of 1857 and 1846.)

Subsequently the Selma depositary failed, went into liquidation, and a receiver was appointed by the comptroller of the currency April 30, 1867, to take charge of its accounts as provided by law, (see Sec. 5234, R. S., act June 3, 1864,) and by the provisions of said section the receiver, so appointed, was required by the comptroller to give such bond and security as he deemed proper.

The receiver upon closing the affairs of said bank and depositary, a dividend of 35 per cent. was declared by the comptroller of the currency on its debts and liabilities, and the sum of $641.32 was ordered to be paid into said court, for the appellants, as a dividend on said sum of $1,872.75 which had been deposited in the said depositary by the clerk, under instructions from the appellees', p. 5.

The final proceedings in the said District Court establish the fact that the appellant's cotton was not subject to seizure

and confiscation, as appears by the motion made by the District Attorney to dismiss the case at the defendant's cost. (P. 5.) It is therefore manifest that the appellees are justly chargeable and responsible for such illegal proceedings.

II,

which brings us to consider the question, Who must bear the loss by the failure of the Selma Depositary?

The proceeds arising from the sale of the appellant's property was placed in the Selma Depositary by an officer of the said District Court, upon instructions from the Secretary of the Interior; that the First National Bank of Selma had been designated a depositary for the public moneys by the Secretary of the Treasurr, and the Clerk of the Court was required under the law to deposit the money in the said Selma Depositary, (See 5492 R. S., Acts March 3, 1857, and August 6, 1846;) therefore the responsibility of this act must rest with the appellees.

In the case of Exparte, Morris v. Johnson, the Supreme Court held, "That when a marshal deposited money pursuant to instructions from the proper authority, he is exonerated," 9 Wallaces, p. 605.

Then as the marshall and clerk of the said district court cannot be held responsible for the deposit of the said *public money* in the Selma depositary, the responsibility must rest with the appellees, inasmuch as there were the "proper authority" who issued the "instructions" to the clerk and marshal to deposit the money in the said depositary, and which was held by them as part of the Treasury of the U. S. (Sec. 310, 3644 R. S.)

And furthermore, it is provided, that if any Treasurer of the U. S., or any Assistant Treasurer, or any *public depositary* fails safely to keep *all moneys* deposited by a disbursing officer or other person having *moneys of the U. S.*, he shall be deemed guilty of embezzlement, and be subject to fine and imprisonment, (Sec. 5489, R. S.)

Again: if any loss accrued to the appellees by the failure of the Selma Depositary, it must have been produced by neglect to enforce the law, as the act of June 3, 1864, (see 5153 R. S.,) provides that the Secretary of the Treasury *shall require* the associations thus designated (as depositaries of public moneys) to give *satisfactory security* by the deposit of *United States bonds* and otherwise for the *safe-keeping* and *prompt payment* of the *public money deposited with them*, and for the *further performance of their duties* as financial *agents of the Government.*

The law is here explicit and direct, requiring the designated depositary banks to give security by the deposit of United States bonds with the Treasury Department, and otherwise for the prompt payment of the *public money* deposited with them; and if the appellees, through the Treasury Department, failed to enforce this provision of law, and thereby secure the public money in case of failure of the Selma Depositary, they are bound to bear the loss, whatever that may be.

III.

This brings us to consider the question whether the money arising out of the conversion of the appellant's property by the said confiscation proceedings was *public money.*

It appears by the act of the appellees themselves, that they regarded it as public money, after seizing, condemning and converting said property into money, they directed it to be placed in a bank which had been designated as a depositary of public moneys, where it could not have been deposited if it had not been public money; but, being placed in said depositary, it was subject to transfer by the order of the Secretary of the Treasury, to the credit of the Treasurer, as other public money. (Sec. 3640, R. S., act Aug. 6, 1846, which made it subject to the

draft of the Treasurer of the U. S.; Sec's 3644, 3593, act Aug. 6, 1846.)

The court below, in speaking of the public moneys deposited in the designated depositary banks, held that "such money, or the credit thereof, when under the control of the Treasurer of the Uuited States and subject to his draft, may, to that extent and in some sense, be regarded as in the Public Treasury."

It, therefore, seems perfectly clear that the appellees treated the appellants money as public money, by making it subject to the draft of the Treasurer of the U. S. as other public money.

IV.

This, *then*, is an action for money had and received.

No priority of contract between the parties is required in order to support this action, except that which resuits from the fact of one man's having the money of another which he cannot conscientiously retain.

Mason *vs.* Waite, 17 Mass., 563.
Hall *vs.* Marston, Id., 579.
Eagle Bank *vs.* Smith, 5 Conn., 71.
Rapalje *vs.* Emory, 2 Dall., 54.

When money has been received by the defendant in consequence of some tortious act to the plaintiff's property, the plaintiff may waive the *tort*, and sue in *assumpsit* for *money had and received.*

Jones *vs.* Hoar, 5 Pick., Mass., 285.
Beardly *vs.* Root, 11 Johns, 464.
Pritchard *vs.* Ford, 1 J. J. Marshall, 543.
Tutt *et al. vs.* Ide *et al.*, 3 Blach., c. c. 249.
Wright *vs.* Butler, 6 Wend., 290.
Eddy *vs.* Smith, 13 Wend., 488.
Hall *vs.* Shultz, 4 John., 249.
Moses *vs.* Macfarlan, 2 Burr, 1012.
Feltham *vs.* Ferry, Loft's Report, 208.

Mr. Justice Blackstone says: "This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex aequo et bono* he ought to refund. It lies for money paid by mistake * * or through imposition, extortion, or *oppression*, or *where any undue advantage is taken of the plaintiff's situation.*" (3 Blackstone, 163.)

The appellees cannot refuse to refund the money of the appellants because the Selma Depositary failed; that was their concern; and furthermore the Selma Depository was part of the Treasury of the United States, as designated-depository banks are so regarded by law.

Sec. 310, Rev. Stat.
Sec. 3527, Rev. Stat.
Sec. 3593, Rev. Stat.
Sec. 3642, Rev. Stat.
Sec. 3644, Rev. Stat.
Sec. 3646, Rev. Stat.
Sec. 3649, Rev. Stat.
Sec. 3655, Rev. Stat.
Sec. 5153, Rev. Stat.
Sec. 5489, Rev. Stat.
Sec. 5492, Rev. Stat.

THEO. H. N. MCPHERSON,
for Appellants.

OFFICE SUPREME COURT U. S.
FILED
MAR 16 1880
D. W. MIDDLETON, Clerk.

In the Supreme Court of the United States.

THOMAS BRANCH ET AL., APPELLANTS,
vs.
THE UNITED STATES.

Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The substantial facts found by the court (fol. 9) are, that in 1865 cotton of the claimants came into the custody of a district court of the United States by due process of law in a suit for confiscation, under the act of August 6, 1861 (12 St., 319); that it was sold in 1866, under an interlocutory order of the court, for $4,050, and after deducting $2,177.25 as expenses, the net balance of $1,872.75 was received by the clerk of the court, and deposited by him in a national bank, (which he had been notified by the Secretary of the Interior was a designated depositary of public money) to his own credit as clerk, pending the proceedings of condemnation, and to await the further orders of the court; that in 1871

the suit was dismissed, but in 1867 the bank had failed and such proceedings were had in liquidation of its affairs under direction of the Comptroller of the Currency that $641.32, being 35 per cent. only of the said deposit, was realized as the dividend thereon, which was by order of the court received by the clerk and paid over in 1875 to the claimants.

ARGUMENT.

To maintain the action on these facts, it must be held either that the United States are liable for the safekeeping of all property that may come into the custody of the Federal courts, or that they are liable for all deposits in a national bank, being a designated depositary of public money. In either form, the position is manifestly untenable; but while even the claimants do not so contend, their claim cannot otherwise be supported, as will be seen.

If property taken into judicial custody in a suit between private parties should be lost, the injured party could not, of course, hold either the opposite party or the sovereign power which established the court responsible; and when the United States becomes a litigant in its courts, its liabilities are no other or greater than those of a private suitor in respect of such a loss.

It is equally clear on the other hand that there is nothing in the relation of the sovereign power to the national banks created by it which makes the former liable for obligations of the latter, otherwise than as by statute a liability may have been expressly assumed and it makes no difference as to this that the bank may have been designated as a depositary of public money. All this is so fully and clearly explained in the opinion

of the court (fols. 11, 12, 13) that it is needless to discuss it, for there is no pretense that there is any such statutory recognition of liability in cases like this.

On the contrary, it appears that from the time the cotton and its proceeds in this case came into the custody of the court, until the loss by failure of the depositary bank, the relations of all concerned as to moneys in the registry were regulated by statute (act March 3, 1817, 3 St., 395), which so far as relates to this case left the disposition of the fund to the discretion of the court (fol. 14).

It follows that the fund so received by the court in its custody and so deposited by it under the discretion inherently belonging to it (The Bark Laurens, 1 Abb. Adm., 513), and which is recognized also by the statutes, was in no sense public money, but a mere private credit as between the court and the bank, as to which the defendants had no knowledge or concern, as the opinion very clearly shows (fol. 14).

In fact the only attempt to establish the liability claimed is rested on the fact stated in the third finding (p. 5), that the clerk of the court was notified by the Interior Department that the bank had been designated as a depositary of public money, which is quite immaterial.

The notice was proper, as the court in revenue and other cases might have in its custody funds which might be found to be public money (as in case of a recovery of taxes, or fines and penalties), the disposition of which might be lawfully directed or suggested; but the Secretary had no right to interfere with the authority of the court to control such a fund as that in question, and it is evident that he did not attempt to.

Extended argument is needless in view of the clear and full discussion of the subject in the opinion of the court below, to which this court is referred.

CHARLES DEVENS,
Attorney-General.
THOMAS SIMONS,
Assistant Attorney-General.